

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,) 2:02-cr-0418-GEB
Plaintiff,)
v.) SENTENCING DECISION
FERNANDO LOPEZ-CUEVAS and ANTELMO) FOLLOWING REMAND
ONTIVEROS,)
Defendants.)

The Ninth Circuit remanded sentencing in this action for further proceedings in light of United States v. Booker, 543 U.S. 220 (2005), and United States v. Ameline, 409 F.3d 1073 (9th Cir. 2005) (en banc). Ameline requires a district court on remand to consider whether the sentence previously imposed "would have been materially different had the district court known that the Guidelines were advisory. . . ." 409 F.3d at 1084. Following remand, an Order was issued to the parties requesting their views on the remanded issues.

The government argues "nothing in the record indicates this Court felt constrained by the then-mandatory nature of the sentencing guidelines" and the record reveals that under "the advisory Sentencing

1 Guidelines . . . [and] the factors provided in 18 U.S.C. § 3553(a)"
2 the Defendants' sentences "would not be materially different"
3 (Govt's Position Regarding Limited Remand Procedures Pursuant to
4 United States v. Ameline at 5, 6.)

5 Fernando Lopez-Cuevas's response also cites section 3553,
6 and argues his deportable alien status and ineligibility for the
7 Bureau of Prisons drug treatment program should be considered.
8 (Lopez-Cuevas' Resentencing Brief at 3.) In addition, he argues his
9 deportable alien status "precludes [him] from various prison jobs" and
10 this can only be overcome if he is provided the opportunity to present
11 evidence that he has strong family/community ties in the United
12 States, that he has a history of domicile in this nation, and a
13 verified history of employment. (Id. at 4.) Further, Lopez-Cuevas
14 argues he was "merely a 'mule'" in the offenses. (Id. at 5.)

15 Antelmo Ontiveros also argues the sentencing factors favor
16 lowering his sentence, and that although this Court had "discretion to
17 find obstruction of justice following [his] testimony[,] . . . it
18 would be reasonable not to impose those two additional levels and
19 . . . [to] re-sentence [him] to 121 months" (Ontiveros'
20 Resentencing Brief at 5-6.)

21 Defendant Lopez-Cuevas

22 Lopez-Cuevas has an offense level of 36, a criminal history
23 category of V, and an advisory guideline range of 292-365 months
24 imprisonment.

25 The reporter's transcript of Lopez-Cuevas's sentencing
26 hearing reveals he was "sentenced at the bottom of his guideline range
27 because he face[d] a very lengthy sentence, and . . . that imposition
28 of [this] sentence . . . [was] sufficient to comport with the

1 sentencing factors . . . in [18 U.S.C. §] 3553." (Lopez-Cuevas's RT
2 at 13.)

3 Lopez-Cuevas's argument that seeks to minimize his role in
4 the offense is belied by the record. He knowingly transported the
5 drugs that were involved in his convictions. At his sentencing
6 hearing, Lopez-Cuevas made downward departure arguments based on his
7 deportable alien status which were denied, even though it was
8 recognized that discretion existed to vary from his guideline sentence
9 on these grounds. His argument that his deportable alien status
10 precludes him from certain prison jobs is not within the scope of the
11 limited remand.

12 The section 3553 factors concerning the history and
13 circumstances of the offenses, promoting respect for the law,
14 affording adequate deference and protecting the public from further
15 crimes of the Defendant, reveal that the sentence imposed would not
16 have been materially different had the Court known at the time of
17 Lopez-Cuevas's sentence that the guidelines were advisory.

18 Defendant Ontiveros

19 Ontiveros has a a total offense level of 36, a criminal
20 history category of I, and an advisory guideline range of 188 to 235
21 months imprisonment. (Presentence Report at 11.) Ontiveros brokered
22 the sale of the drugs that Lopez-Cuevas transported. A search of the
23 transport vehicle revealed "approximately six pounds of
24 methamphetamine in a bag under the spare tire" cover. (Id. at 4.)
25 "Six individual packages were wrapped in red plastic, and the total
26 weight of methamphetamine was . . . 2,809 grams." (Id.)

27 Ontiveros was an equal participant in the drug offenses of
28 conviction since "he arranged for the distribution and delivery of 2.8

1 kilograms of methamphetamine." (Id. at 12.)

2 At Ontiveros's sentencing hearing I stated: "A sentence at
3 the low end of the guideline range satisfies the sentencing factors a
4 judge is required to consider in [18 U.S.C. §] 3553. The defendant
5 has no prior record, and the sentence he faces, unfortunately, is a
6 very lengthy sentence." (Ontiveros's RT at 5.) He was sentenced at
7 the bottom of his guideline range.

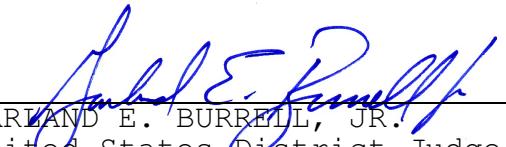
8 Considering "the nature and circumstances of the offense,"
9 the need for the sentence "to reflect the seriousness of the offense,
10 [and] to promote respect for the law," the sentence imposed was not
11 materially different from the sentence that would have been given had
12 the Court known that the guidelines were advisory. 18 U.S.C.
13 § 3553(a).

14 CONCLUSION

15 For the stated reasons, each Defendant's request for
16 resentencing is denied.

17 IT IS SO ORDERED.

18 Dated: November 21, 2006

19 
20 GARLAND E. BURRELL, JR.
21 United States District Judge

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